

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3660

**Report Summary**

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee  
Hon. Joyce L. Kennard, Chair  
Joshua Weinstein, Attorney, 415-865-7688

DATE: March 30, 2000

SUBJECT: Filing the Brief in Death Penalty Appeals (amend Cal. Rules  
of Court, rule 39.57)

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Issue Statement

In February 1997, the Judicial Council adopted rules 39.50–39.57 in response Assembly Bill 195. (Stats. 1996, ch. 1086, § 3.) That legislation implemented (1) expedited death penalty record preparation and (2) a separate briefing schedule for death penalty cases. The AB 195 record preparation process requires the trial court to provide the record to trial counsel within 30 days of imposition of judgment. (Pen. Code, § 190.8(b).) The trial court, with the assistance of trial counsel, must then certify the record for completeness within 90 days of judgment. (Pen. Code, § 190.8(d).)

Once the record is certified for completeness, it is delivered to appellate counsel. (Pen. Code, § 190.8(f).) The AB 195 briefing schedule is triggered by delivery of the completed record to appellate counsel. (Pen. Code, § 190.6(b).) That briefing schedule allows appellate counsel seven months to prepare and file the opening brief. (Pen. Code, § 190.6(b).) During that same seven-month period, the trial court—working with appellate counsel—must certify the record for accuracy within 120 days from the date of certification for completeness. (Pen. Code, § 190.8(g).)

The record preparation process implemented by AB 195 applies to cases in which *trial* commenced on or after January 1, 1997. However, that the seven-month briefing schedule applies to cases where the *sentence of death* was imposed on or after January 1, 1997. (Pen. Code, § 190.6.) Rule 39.57(a) provides, in accordance with the language of section 190.6, that the seven-month briefing schedule applies to “cases in which a sentence of death was imposed on or after January 1, 1997.” There is an in-between category of cases, in which the AB 195 briefing schedule applies

but the AB 195 record preparation process does not apply. It is problematic to apply the briefing scheduling to these in-between cases.

The time for the filing of the opening brief runs from the time the record is “certified for completeness” or the time that appellate counsel receives “the completed record.” (Pen. Code, § 190.6(b); Rule 39.57(a).) However, in the in-between cases, AB 195’s two-part certification process does not apply. Therefore, there is no “certification for completeness.”

#### Recommendation

The Appellate Advisory Committee recommends that the Judicial council, effective July 1, 2000, amend rule 39.57 of the California Rules of Court, to apply to capital cases that commenced on or after January 1, 1997.

#### Rationale for Recommendation

The proposed amendment would solve this problem by amending rule 39.57 to apply only to cases in which *trial began* on or after January 1, 1997. Under the proposed amendment, the rule 37 briefing procedures—which govern pre-AB 195 cases—would apply to the in-between cases.

The proposed amendment to rule 39.57 appears to be consistent with the intent of the statutory scheme. Although Penal Code section 190.6(b) states that the seven-month briefing schedule can logically be applied only in those cases in which the record has been certified for completeness in accordance with section 190.8(d), that will occur only in cases in which the trial began on or after January 1, 1997.

#### Alternative Actions Considered

The Appellate Advisory Committee considered several other actions, including amending rules to apply pre-AB 195 record preparation procedures to the in-between cases or statutory amendments. However, this option was selected as it appears to best effectuate the purposes of AB 195.

#### Comments from Interested Parties

The proposed amendments to rule 39.57 were circulated in the winter 2000 circulation for comment. Six comments were received, all agreeing with the proposed amendment (see the attached table).

#### Implementation Requirements and Costs

There are no costs to implement as proposal is rule change.

The text of the proposed amended rule is attached at page 3.

**Comments for**  
**Appeal of Death Penalty Cases: Filing the Brief**  
 (Cal. Rules of Court, rule 39.57)

	<b>Commentator</b>	<b>Position</b>	<b>Comment on Behalf of Group</b>	<b>Comments</b>	<b>Committee Response</b>
1.	Richard Oliver Attorney San Joaquin County Bar Association	A		Conforms Penal Code sections 190.6 and 190.8 with Rules of Court.	
2.	Phrasel L. Shelton Chair, Rules Committee Superior Court of San Mateo County	A	Y		
3.	Mary E. Fuller Judge Superior Court of San Bernardino County	A			
4.	Emry Allen Chief Attorney Office of the State Public Defender	A	Y		
5.	Julie Ann Burton Superior Court of Yolo County	A			
6.	Hannah Inouye Los Angeles Superior Court	A	Y		

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.